No. 10-130

In the Supreme Court of the United States

ZHAN GAO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board of Immigration Appeals (Board) reasonably concluded that an offense need not be an aggravated felony to qualify as a "particularly serious crime" that bars eligibility for withholding of removal under 8 U.S.C. 1231(b)(3)(B).

2. Whether an offense must be an aggravated felony or a crime designated by regulation as particularly serious to qualify as a "particularly serious crime" that bars eligibility for asylum under 8 U.S.C. 1158(b)(2)(A)(ii).

3. Whether the Board reasonably concluded that, once it has determined that a crime is a "particularly serious" one, no separate determination that an alien is a danger to the community is necessary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-18a) is reported at 595 F.3d 549. The opinions of the Board of Immigration Appeals (Pet. App. 19a-46a) and of the immigration judge (Pet. App. 47a-151a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2010. A petition for rehearing was denied on April 23, 2010 (Pet. App. 1a). The petition for a writ of certiorari was filed on July 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security and the Attorney General may, in

their discretion, grant asylum to an alien who demonstrates that she is a "refugee" within the meaning of the INA. 8 U.S.C. 1158(b)(1)(A). The INA defines a "refugee" as an alien who is unwilling or unable to return to her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). An alien applying for asylum generally must file her application within one year of arriving in the United States. 8 U.S.C. 1158(a)(2)(B) and (D). The applicant bears the burden of demonstrating that she is eligible for asylum. 8 C.F.R. 1208.13(a), 1240.8(d). Once an alien has established asylum eligibility, the decision whether to grant or deny asylum is left to the discretion of the Attorney General or the Secretary of Homeland Security. 8 U.S.C. 1158(b)(1) and (2).

An alien is not eligible for asylum, however, "if the Attorney General determines" that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States." 8 U.S.C. 1158(b)(2)(A)(ii). For purposes of asylum, the INA provides that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime," 8 U.S.C. 1158(b)(2)(B)(i), and that "[t]he Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime," 8 U.S.C. 1158(b)(2)(B)(ii).

b. An alien also may be eligible for withholding of removal under the INA. See 8 U.S.C. 1231(b)(3)(A); 8 C.F.R. 1208.13(c)(1), 1208.16(a). Withholding of removal is available if the alien demonstrates that her "life or freedom would be threatened" in the country of re-

moval "because of [her] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). In order to establish eligibility for withholding of removal, an alien must prove a "clear probability of persecution" upon removal, a higher standard than that required to establish asylum eligibility. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430 (1987).

As with asylum, an alien is ineligible for withholding of removal "if the Attorney General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B). For purposes of withholding of removal,

> an alien who has been convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime. The previous sentence shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime.

Ibid.

c. An alien who is ineligible for asylum and withholding of removal may obtain deferral of removal under regulations implementing United States obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85. To obtain this protection, an applicant must demonstrate, *inter alia*, that it is more likely than not that she would be subject to severe pain or suffering intentionally inflicted

"by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" if removed to a certain country. 8 C.F.R. 1208.18(a)(1); see 8 C.F.R. 1208.16(c)(2).

2. Petitioner is a native and citizen of China. Pet. App. 4a. She came to the United States on a student visa in 1989 and became a lawful permanent resident in 1993. *Id.* at 4a, 112a.

From at least mid-2000 through February 2002, petitioner exported computer components to China in violation of federal law. Pet. App. 4a, 23a, 112a, 143a; Administrative Record (A.R.) 6086-6089. Those components included "sophisticated military microprocessors" designed for use in aircraft navigation, flight control, weapons control, radar, and airborne battle management systems. Pet. App. 144a; see A.R. 6089-6090. The components "can also perform target identification and discrimination functions in missiles, allowing the missile to hone in on and destroy its target." Pet. App. 144a. The components are restricted from export for national security reasons. *Id.* at 113a, 143a; A.R. 6089.

Petitioner used aliases to conceal her true identity when acquiring and exporting the components and falsely told the sellers of the components that she was affiliated with American universities and was purchasing the items for research in the United States. Pet. App. 113a, 143a; A.R. 6089. Petitioner then sold the components to entities that were connected to the Chinese military and were actively acquiring products and technology to develop military applications. Pet. App. 113a, 115a-116a, 118a-119a, 143a-144a; A.R. 6087.

In early 2001, petitioner traveled to China to visit family. Pet. App. 4a. Petitioner carried with her two computer components, which she provided to her Chi-

nese customers in violation of United States export laws. *Id.* at 117a. While in China, petitioner was detained by the Chinese government and tried for taking "internal" documents out of China and for assisting the government of Taiwan. *Id.* at 4a. She was convicted and sentenced to ten years of imprisonment, but was released on medical parole two days after her conviction. *Id.* at 4a, 63a. While petitioner was detained in China, her husband attempted to continue carrying on her illegal export business. *Id.* at 5a, 118a.

Petitioner then returned to the United States and resumed exporting restricted technology to China. Pet. App. 4a, 23a, 118a-119a. Petitioner made seven new shipments of components between November 2001 and January 2002. *Id.* at 5a, 23a. Petitioner also developed new aliases and "devised new 'ruses' to mislead customers as to her future intentions." *Id.* at 4a, 118a-119a. Petitioner continued her illegal activity even though she knew that the United States government had been responsible for securing her release after her trial in China. *Id.* at 119a; see *id.* at 33a. Petitioner did not stop exporting controlled items to China until the United States government became aware of her activities and executed a search warrant at her home in February 2002. *Id.* at 118a-119a.[1]

Petitioner received over $500,000 in proceeds from the illegal exports. Pet. App. 4a; A.R. 6091. She attempted to hide those proceeds by transferring them between different bank accounts, Pet. App. 115a, 144a; A.R. 6091,

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[1] Petitioner continued some of her illegal activities even after that point; as the Board noted, she "contacted manufacturers and placed orders using a fictitious name and cover story in April or May 2003, only months before her November 2003 plea agreement." Pet. App. 24a (internal quotation marks omitted).

and she and her husband knowingly filed false tax returns that omitted these proceeds, Pet. App. 4a; A.R. 6091-6092.

3. In November 2003, petitioner pleaded guilty to two felonies: unlawful export of commerce-control-list items and tax fraud. Pet. App. 5a; see 26 U.S.C. 7206(1) (tax fraud); 50 U.S.C. 1702, 1705(b) (unlawful export); 15 C.F.R. 736.2, 764.2, 764.3(b) and 774.1 (unlawful export); Exec. Order No. 12,924, 3 C.F.R. 917 (1994) (unlawful export); see also A.R. 6079-6085 (judgment).[2]

Based on those convictions, the Department of Homeland Security (DHS) initiated removal proceedings against petitioner. A.R. 6217-6220. Petitioner was charged with being inadmissible on two grounds: as an alien who entered the United States to engage solely, principally, or incidentally in activity to violate or evade prohibitions on exporting goods, technology, or sensitive information from the United States; and as an alien who was convicted of a crime involving moral turpitude. Pet. App. 5a-6a; A.R. 6217-6219; see 8 U.S.C. 1182(a)(3)(A)(i)(II) (entering U.S. to engage in prohibited export activity); 8 U.S.C. 1182(a)(2)(A)(i)(I) (crime of moral turpitude).

After several hearings, an immigration judge (IJ) determined that petitioner was not removable on the first ground but was removable on the second ground, because her convictions for tax fraud and unlawful export were crimes involving moral turpitude. Pet. App. 49a, 102a. In particular, the IJ found that petitioner's

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[2] Although she entered a guilty plea with the assistance of counsel, petitioner later filed a petition under 28 U.S.C. 2255, seeking to attack her conviction and sentence on numerous grounds. The district court denied the petition. See *Gao* v. *United States*, 375 F. Supp. 2d 456 (E.D. Va. 2005).

conviction records demonstrated a "course of deception and knowing, willful violations, for monetary gain, of export control regulations intended to protect the national security [of the United States]." *Id.* at 145a; see *id.* at 113a (petitioner "routinely employed a number of dishonest and unethical practices in her business"). Petitioner does not dispute that she is removable on these grounds. *Id.* at 7a, 18a, 35a, 140a.

The IJ then granted petitioner asylum, withholding of removal, and deferral of removal under the CAT. Pet. App. 91a-98a, 102a. The IJ determined that petitioner's detention in China in 2001 constituted past persecution on account of her political opinion, and that petitioner likely would be persecuted and tortured if returned to China because she has spoken out against the Chinese government. *Id.* at 91a-98a.

The IJ rejected DHS's argument that petitioner was ineligible for asylum and withholding because her conviction for unlawful export qualified as a "particularly serious crime." Pet. App. 147a-150a. The IJ acknowledged that petitioner's crime was "serious, morally reprehensible, and creat[ed] potential future risks" to the United States, but was of the view that the crime was not particularly serious because it did not involve "a direct link to violent crime" or "directly affect the health of individuals in the United States." *Id.* at 149a.

The IJ then denied petitioner's requests for various discretionary waivers that would allow her to retain her lawful permanent resident status, finding that petitioner "abused" the privilege of lawful permanent residency and "caused substantial problems * * * for a number

of critically important U.S. Government agencies." Pet. App. 101a.[3]

4. a. The Board of Immigration Appeals (Board) reversed. Pet. App. 30a-46a. As relevant here, the Board held that petitioner is ineligible for asylum and withholding of removal because her conviction for unlawfully exporting controlled items qualifies as a "particularly serious crime." *Id.* at 38a-43a. The Board explained that while an unlawful export conviction does not always qualify as a particularly serious crime, "in this case * * * the national security implications of [petitioner's] offense render it a particularly serious crime." *Id.* at 40a. The Board explained that, under its established precedent, whether a crime qualifies as particularly serious is determined on a case-by-case basis, and it rejected the view that a crime must be an "aggravated felony" to qualify as "particularly serious." *Id.* at 40a-41a.

The Board found that petitioner had "acted with blatant disregard for the laws of this country and placed her desire for financial gain ahead of the security interests of the United States." Pet. App. 42a. The Board explained that petitioner had exported "sophisticated microprocessors with well-known military applications," using "several aliases and obtain[ing] the devices at deep discounts by falsely claiming to be affiliated with various universities and telling distributors that the items would be used for academic purposes," and then "s[elling] the microprocessors at substantial mark-ups to quasi-governmental entities." *Id.* at 41a-42a. The Board also noted that, after her incarceration and conviction in

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[3] Petitioner did not appeal the denial of this discretionary relief, Pet. App. 31a n.1, and it is therefore not at issue here.

China, petitioner returned to the United States and promptly "resumed her business dealings and even adopted new aliases." *Id.* at 42a. The Board determined that petitioner created a substantial risk to national security, and found it "impossible to quantify the number of lives [she] potentially imperiled by exporting military technology that is still presumably extant." *Ibid.*

Although the Board held that petitioner is ineligible for asylum and withholding of removal, it upheld the IJ's grant of deferral of removal under the CAT. Pet. App. 7a, 46a.

b. On cross-motions for reconsideration, the Board reaffirmed that petitioner's offense qualifies as a particularly serious crime. Pet. App. 25a-28a. The Board rejected petitioner's argument that an offense must be an aggravated felony to qualify as a particularly serious crime that bars withholding of removal, explaining that the statutory text places no such limit on the Attorney General's discretion. *Id.* at 25a-26a. Again relying on the Board's longstanding "practice * * * of making particularly serious crime determinations on a case-by-case basis," the Board reiterated that petitioner's "unlawful export activity with China presented a risk to national security that elevated her offense to a particularly serious crime." *Id.* at 26a-27a.[4]

5. The court of appeals denied the petition for review. Pet. App. 2a-18a. The court first held that a crime

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[4] The Board also reversed the IJ's ruling that petitioner is not inadmissible under 8 U.S.C. 1182(a)(3)(A)(i)(II), as an alien who entered the United States to engage in unlawful exportation. Pet App. 21a-24a. Petitioner challenged that holding on appeal, but the court of appeals did not address it because petitioner conceded that she was removable on another ground. *Id.* at 18a. Petitioner does not renew the argument before this Court.

need not be an aggravated felony to qualify as a particularly serious crime for purposes of withholding of removal. *Id.* at 8a-12a. Applying the familiar framework set out in *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984), the court determined that the statute does not unambiguously provide that an offense must be an aggravated felony to be a particularly serious crime and that the Board's reading of the statute is reasonable. Pet. App. 9a-12a. The court explained that the statute provides that the Attorney General may "decide" that an alien's offense is a particularly serious crime, 8 U.S.C. 1231(b)(3)(B), and nothing in the statute limits that broad discretionary authority to find crimes particularly serious. Pet. App. 8a-9a.

The court of appeals explained that the Board's construction of the statute—set out in the Board's recent precedential decision in *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007), aff'd, 587 F.3d 1052 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010)—is plainly reasonable. Pet. App. 10a-12a. The court explained that the statute's text "does not declare that some categories of crimes may not be considered particularly serious"; rather, it "creates a per se rule that some aggravated felonies must be considered particularly serious and then leaves it up to the Attorney General to 'decide[]' whether other crimes are as well." *Id.* at 10a-11a (quoting 8 U.S.C. 1231(b)(3)(B)). The court determined that the Board's interpretation is consistent with the statute's history and background and that it furthers the statute's purpose, which is "to protect the public from dangerous individuals," even if their crimes do not qualify as aggravated felonies under the INA. *Id.* at 11a-12a.

The court then turned to asylum, and rejected petitioner's argument that an offense can qualify as a particularly serious crime for asylum purposes only if it is an aggravated felony or the Attorney General has designated it as a particularly serious crime by regulation. Pet. App. 12a-15a. The court observed that the asylum provision, like the withholding provision, grants the Attorney General broad authority to "determine[] that" a crime is particularly serious; that petitioner conceded that a crime need not be an aggravated felony to qualify as "particularly serious" for asylum purposes; and that "nothing in the statute says that the Attorney General must use regulation[s] to designate crimes as particularly serious." *Id.* at 13a-14a. The court noted that the statute's language—stating that the Attorney General "*may* designate by regulation" certain offenses as particularly serious, 8 U.S.C. 1158(b)(2)(B)(ii) (emphasis added)—is "permissive" and "does not preclude [the Attorney General] * * * from determining whether an individual alien's crime [is] particularly serious by looking at the underlying facts in the course of adjudication." Pet. App. 14a. The court also observed that it is a "basic principle of administrative law" that an agency may choose to proceed through rulemaking or adjudication, and that requiring a categorical approach would be "insensitive to individual circumstances" and create "immense practical difficulties." *Id.* at 14a-15a.

In a footnote, the court rejected petitioner's argument that, in addition to determining that a crime is a particularly serious one, the Board also must independently find that the alien is a danger to the community. Pet. App. 12a n.1. The court cited its prior holding that "once the particularly serious crime determination is made, the alien is ineligible for withholding without a

separate finding on dangerousness." *Ibid.* (quoting *Kofa* v. *INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)).[5]

6. Petitioner filed a petition for rehearing, which was denied, with no judge calling for a vote on the petition. Pet. App. 1a.

ARGUMENT

1. Petitioner first contends (Pet. 16-23) that an offense must be an aggravated felony to qualify as a particularly serious crime for purposes of withholding of removal. The court of appeals correctly rejected that argument. Although there was disagreement in the circuits on this issue prior to the Board's precedential decision in *In re N-A-M-*, 24 I. & N. Dec. 336 (B.I.A. 2007), aff'd, 587 F.3d 1052 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010), there is not now disagreement in the circuits about whether the Board's authoritative interpretation is entitled to deference. Accordingly, review of the question presented is not warranted at this time.

a. The court of appeals correctly deferred to the Board's interpretation of the withholding-of-removal provision under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). That provision states that an alien is ineligible for withholding of removal "if the Attorney General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States." 8 U.S.C. 1231(b)(3)(B). It then prescribes a per se rule that "an alien who has been convicted of an aggravated felony (or

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[5] The court also held that the Board did not abuse its discretion in finding that petitioner's crime was particularly serious based on its facts. Pet. App. 16a-17a. Petitioner does not challenge that holding before this Court.

felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years shall be considered to have committed a particularly serious crime." *Ibid.* Finally, the statute provides that the per se rule "shall not preclude the Attorney General from determining that, notwithstanding the length of sentence imposed, an alien has been convicted of a particularly serious crime." *Ibid.*

The court of appeals correctly applied the familiar *Chevron* framework and concluded that the Board's interpretation of the statute was reasonable. Section 1231(b)(3)(B) does not set forth a restrictive rule that only aggravated felonies may qualify as particularly serious crimes. Instead, it grants the Attorney General the discretionary authority to decide if a crime is particularly serious, with the only limitation being that some aggravated felonies *are* per se "particularly serious." Pet. App. 9a-10a. As the court of appeals explained, "[t]he statute does not declare that some categories of crimes may not be considered particularly serious"; instead, "it creates a per se rule" and "then leaves it up to the Attorney General to 'decide[]' whether other crimes are [particularly serious] as well." *Id.* at 10a-11a.

Because the statutory text does not prohibit the Attorney General from determining that a non-aggravated felony is a "particularly serious crime," the Board's interpretation of the statute is entitled to deference so long as it is reasonable. *E.g.*, *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) ; see 8 C.F.R. 1003.1(d)(1). The Board has long held that whether a crime is "particularly serious" depends upon "consideration of the individual facts and circumstances" of each case, *In re L-S-*, 22 I. & N. Dec. 645, 651 (B.I.A. 1999), such as the "nature of the conviction, the circumstances and underlying facts of

the conviction, the type of sentence imposed, and * * * whether the type and circumstances of the crime indicate that the alien will be a danger to the community," *In re Frentescu*, 18 I. & N. Dec. 244, 247 (B.I.A. 1982). In its recent decision in *N-A-M-*, the Board explained why, in light of the statute's text, history, and purposes, particularly serious crimes are not limited to aggravated felonies. 24 I. & N. Dec. at 338-341. The Board noted that the text includes no such limitation; that the statutory history shows that Congress intended "to allow a more flexible analysis in determining whether an offense is a particularly serious crime"; and that limiting particularly serious crimes to aggravated felonies "would be inconsistent with the goal of protecting the public." *Id.* at 340-341.[6]

The Board's interpretation of the statute is plainly reasonable. The statute by its terms gives the Attorney General the discretion to decide which claims qualify, with the only limitation being that some aggravated felonies necessarily constitute particularly serious crimes. 8 U.S.C. 1231(b)(3)(B). Moreover, the statute's legislative history confirms that, beyond the per se rule for aggravated felonies for which an alien received at least a five-year sentence, Congress intended that the "Attorney General retain[] the authority to determine other circumstances in which an alien has been convicted of a particularly serious crime, regardless of the length of

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[6] Petitioner suggests (Pet. 22) that the Board's view in *N-A-M-* is not entitled to deference because it rested only on an analysis of the text of the INA. That is incorrect: although the Board did believe that the text plainly allows it to determine that an offense is a particularly serious crime even if the offense is not an aggravated felony, the Board also extensively analyzed the statute's history and purposes in coming to its ultimate conclusion. 24 I. & N. Dec. at 338-341.

sentence." H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 216 (1996).[7]

Further, as the court of appeals noted, the statute's history and purposes support the Board's interpretation. Pet. App. 11a-12a. Since the provision was enacted in 1980, the Board has consistently employed a case-by-case approach, in which "particularly serious crimes need not be aggravated felonies." *Id.* at 11a; see Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (enacting 8 U.S.C. 1253(h)(2)(B) (1980), the predecessor to 8 U.S.C. 1231(b)(3)(B)). Even though Congress "has amended the statute several times, it has never limited the concept of particularly serious crimes to aggravated felonies." Pet. App. 11a. In addition, the Board's view furthers the statute's purpose, which is "to protect the public from dangerous individuals." *Ibid.* As the Board has explained, some offenses "are potentially quite serious yet do not meet the technical requirements of being aggravated felonies"; limiting particularly serious crimes to aggravated felonies would "'create[] a gap or loophole' whereby individuals committing very serious crimes

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[7] The court of appeals properly rejected petitioner's argument that the last sentence of the provision (which states that nothing shall preclude the Attorney General from deciding that other crimes are particularly serious) limits the Attorney General's discretion by implication. As the court explained, "the language of that provision is not restrictive, but permissive," and it is naturally read "not as implicitly limiting the Attorney General's discretion to aggravated felonies but instead as reinforcing the scope of that discretion." Pet. App. 11a Petitioner's invocation of the *expressio unius* canon (Pet. 17) is inapposite here, because the canon does not apply when "statutory language suggesting exclusiveness is missing," *Chevron U S A. Inc* v. *Echazabal*, 536 U.S. 73, 80-81 (2002), such as when the statute "give[s] an agency * * * a good deal of discretion" in making a determination, *id.* at 80 The statute here affords the Attorney General such discretion.

would remain eligible for withholding of removal." *Id.* at 11a-12a (quoting *N-A-M-*, 24 I. & N. Dec. at 341 & n.6).[8]

[8] Petitioner is wrong to suggest (Pet. 18-21) that allowing non-aggravated felonies to qualify as particularly serious crimes would place the United States in violation of its treaty obligations. The Protocol Relating to the Status of Refugees (Protocol), *done* Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, is an international agreement designed to guarantee certain protections to refugees. It incorporates by reference most of the substantive portions of a previous international agreement —the 1951 Convention Relating to the Status of Refugees (Convention), July 28, 1951, 189 U.N.T.S. 150. See Protocol art. I(1) and (2), 19 U.S.T. at 6225, 606 U N.T.S. at 268.

The Convention and therefore the Protocol both preclude member nations from "expel[ling] or return[ing] * * * a refugee" to a country "where his life or freedom would be threatened" on account of a protected ground, Convention art. 33(1), 189 U.N.T.S. at 176. But "[t]he benefit of [that] provision may not * * * be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." Convention art. 33(2), 189 U.N.T.S. at 176.

Congress has wide latitude in implementing its obligations under the Convention and Protocol. See, *e g*, Guy S. Goodwin-Gill & Jane McAdam, *The Refugee in International Law* 528 (3d ed. 2007) (the specific measures each contracting state takes to implement a treaty "are matters very much in the realm of sovereign discretion"). Congress's implementation of the treaty here is plainly reasonable. The Convention and Protocol do not define what types of crimes are sufficiently serious to qualify as particularly serious crimes, and they say nothing about aggravated felonies (a term developed not in the Convention or Protocol, but by Congress in the United States Code). Although petitioner cites (Pet. 19) a statement from a United Nations High Commissioner for Refugees Handbook that a crime must be a "very grave" offense to qualify, that statement does not refer to what constitutes a "particularly serious crime" for purposes of Article 33(2), nor does it say anything about whether the offense must be an aggravated felony. *Handbook on Procedures and Criteria for Determining Refugee Status* ¶¶ 155, 156 (1992). And, of course, the

Accordingly, the Board's interpretation of the withholding provision is "plainly permissible." *Id.* at 10a.

b. Contrary to petitioner's contention (Pet. 13-16), there is no disagreement in the circuits on this issue that warrants this Court's review. The Second, Fourth, Seventh, Ninth, and Tenth Circuits have held that an offense need not be an aggravated felony to qualify as a particularly serious crime under 8 U.S.C. 1231(b)(3)(B). See Pet. App. 9a-12a; *N-A-M-* v. *Holder*, 587 F.3d 1052, 1055-1056 (10th Cir. 2009), petition for cert. pending, No. 10-5651 (filed July 29, 2010); *Delgado* v. *Holder*, 563 F.3d 863, 867-869 (9th Cir. 2009), reh'g en banc granted, 621 F.3d 957 (9th Cir. 2010); *Nethagani* v. *Mukasey*, 532 F.3d 150, 156-157 (2d Cir. 2008); *Ali* v. *Achim*, 468 F.3d 462 (7th Cir. 2006), cert. granted, 551 U.S. 1188, cert. dismissed, 552 U.S. 1085 (2007).

It is true that the Third Circuit has held that an offense must be an aggravated felony to qualify as a "particularly serious crime" under Section 1231(b)(3)(B), *Alaka* v. *Attorney Gen. of the United States*, 456 F.3d 88, 104-105 (2006), and that this Court granted certiorari to address the issue in 2007. But there is not now a circuit conflict warranting this Court's review, for several reasons.

First, the Third Circuit decided *Alaka* in 2006 before the Board's authoritative construction of Section 1231(b)(3)(B) in *N-A-M-*. The Third Circuit therefore has not had the opportunity to consider whether that construction is entitled to *Chevron* deference. Petitioner cites (Pet. 15) two decisions in which the Third Circuit mentioned its holding in *Alaka*, but those decisions do

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Handbook "is not binding on the Attorney General, the [Board], or United States courts." *Aguirre-Aguirre*, 526 U.S. at 427.

not demonstrate that the Third Circuit would adhere to its prior holding after *N-A-M-*. The cases did not address whether an offense must be an aggravated felony to qualify as particularly serious (because the offenses in both cases were aggravated felonies) or consider whether the Board's analysis in *N-A-M-* is entitled to *Chevron* deference generally, and neither creates circuit precedent. See *Quiceno* v. *Attorney Gen. of the United States*, 304 Fed. Appx. 40, 43 (3d Cir. 2008) (unpublished); *Hussein* v. *Attorney Gen. of the United States*, 273 Fed. Appx. 147, 152 (3d Cir. 2008) (unpublished). The circuits that have considered the Board's construction of the statute in *N-A-M-* have all held that it is entitled to *Chevron* deference. See Pet. App. 9a-12a; *N-A-M-*, 587 F.3d at 1055-1056; *Delgado*, 563 F.3d at 867-869.

Second, and relatedly, the Third Circuit in *Alaka* did not consider the Board's interpretation or analyze the issue using the *Chevron* framework. Without even mentioning the Attorney General's broad discretion to "decide[]" that a crime is particularly serious, 8 U.S.C. 1231(b)(3)(B), the court resolved the case based on an "impli[cation]" from the statutory text, stating that "[t]he second sentence, authorizing the Attorney General to determine when a conviction is 'particularly serious,' is clearly tied to the first; it explicitly refers back to the 'previous sentence,' and accordingly *implies* that it is limited to aggravated felonies," 456 F.3d at 104-105 (emphasis added). That brief explanation constituted the Third Circuit's entire legal analysis. The fact that the Third Circuit did not even consider affording deference to the Board renders its legal conclusion plainly suspect. See *Aguirre-Aguirre*, 526 U.S. at 425 (finding that court of appeals erred "by failing to follow *Chevron* principles in its review of the [Board]"). When the Third Circuit

considers the Board's interpretation in *N-A-M-* using the *Chevron* framework, it would be free to determine—and may well determine—that the Board's interpretation is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005). The Third Circuit should be permitted to conduct this analysis before this Court intervenes.

Third, review of the question presented would be premature at this time. Not only has the Third Circuit not had a chance to consider *N-A-M-*, but several other circuits have not considered it as well. Moreover, the Ninth Circuit recently granted en banc review of that issue (and another issue) in *Delgado*. The Court should wait for the decision in that case and allow further percolation in the other circuits before considering the first question presented.

2. Petitioner also contends (Pet. 23-26) that an offense qualifies as a particularly serious crime for asylum purposes only if the offense is an aggravated felony, or the Attorney General has designated the offense as a particularly serious crime by regulation. The court of appeals' decision is correct, and petitioner does not allege any disagreement in the circuits on this point.

a. The court of appeals correctly rejected petitioner's argument that non-aggravated felonies may qualify as particularly serious crimes barring asylum only if the Attorney General has designated them as such by regulation. The statute broadly empowers the Attorney General to "determine[]" that an alien has been convicted of a particularly serious crime. 8 U.S.C. 1158(b)(2)(A)(ii). It then provides a per se rule that "an alien who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. 1158(b)(2)(B)(i). It also

states that "[t]he Attorney General may designate by regulation offenses that will be considered to be a [particularly serious] crime." 8 U.S.C. 1158(b)(2)(B)(ii).

As the court of appeals correctly explained, "nothing in the statute says that the Attorney General must use regulation to designate crimes as particularly serious." Pet. App. 14a. Instead, the text is permissive, providing that the Attorney General "*may* designate by regulation" offenses that will be considered particularly serious. 8 U.S.C. 1158(b)(2)(B)(ii) (emphasis added); see Pet. App. 14a.[9] The court noted that it is "a basic principle of administrative law" that the Attorney General may proceed by regulation or by case-by-case adjudication through the Board, and requiring a categorical approach would deny the agency the flexibility to determine that a crime is particularly serious in a given case even if it does not categorically qualify as such. *Id.* at 14a-15a. The court further observed that requiring the Attorney General to proceed by regulation would create "immense practical difficulties" by requiring the agency to "sift through each state's code and prospectively identify by regulation every single crime that would qualify as 'particularly serious.'" *Id.* at 15a (internal quotation marks omitted).

b. Petitioner does not allege any disagreement in the circuits on this issue. The only courts that have considered petitioner's argument have rejected it. See Pet. App. 12a-15a; *Ali*, 468 F.3d at 468-469; *Delgado*, 563 F.3d at 869-870; see also *Nethagani*, 532 F.3d at 156-157 (rejecting argument that crime must be an aggravated fel-

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[9] Petitioner is mistaken in suggesting (Pet. 24) that the *expressio unius* canon applies here; as with the withholding provision, "statutory language suggesting exclusiveness is missing." *Echazabal*, 536 U.S. at 80-81.

ony under the asylum provision). No further review is warranted for that reason alone.

Moreover, petitioner is mistaken in suggesting (Pet. 23-24) that certiorari should be granted on the second question presented if it is granted on the first because the asylum and withholding provisions "parallel[]" one another. The text of the two provisions is different, see pp. 2-3, 12-13, 19-20, *supra*, and petitioner's legal arguments regarding the two provisions are different. For example, petitioner contends that an offense must be an aggravated felony to qualify as a particularly serious crime for withholding purposes, but concedes that an offense need *not* be an aggravated felony to qualify for asylum purposes. Pet. App. 13a. Indeed, petitioner asserts that "[t]here is a stark contrast between the provision governing withholding of removal * * * and the asylum provision." Pet. 24.

3. Petitioner also argues (Pet. 26-28) that the court of appeals erred in holding that once the Board decides that an alien has committed a particularly serious crime, it need not make an independent finding that the alien is a danger to the community. Petitioner concedes that there is no disagreement in the circuits on this issue.

a. The court of appeals correctly held that "once the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness." Pet. App. 12a n.1 (quoting *Kofa* v. *INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (en banc)). That conclusion rested on the court's prior decision in *Kofa*, where the court applied the *Chevron* framework and upheld the Board's conclusion that no separate dangerousness finding is required. 60 F.3d at 1088-1090.

The relevant statutory text provides that an alien is ineligible for withholding of removal "if the Attorney

General decides" that "the alien, having been convicted by a final judgment of a particularly serious crime is a danger to the community of the United States," 8 U.S.C. 1231(b)(3)(B), and that an alien is ineligible for asylum "if the Attorney General determines" that "the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States," 8 U.S.C. 1158(b)(2)(A)(ii). The Board interpreted this language in its precedential decision in *In re Carballe*, 19 I. & N. Dec. 357 (B.I.A. 1986), modified on other grounds, *In re Gonzalez*, 19 I. & N. Dec. 682 (B.I.A. 1988). It held that the statute's text "does not require that two separate and distinct factual findings be made in order to render an alien ineligible for withholding," and that the language is best read as linking the two clauses, so that the particularly serious crime inquiry involves determining whether the alien is a danger to the community. *Id.* at 360. The Board explained that it evaluates "the nature of the conviction, the circumstances and underlying facts of the conviction, the sentence imposed, and whether the type and circumstances of the crime indicate the alien will be a danger to the community" to determine whether a crime is a particularly serious one that makes the alien a danger to the community. *Ibid.*; see *Frentescu*, 18 I. & N. Dec. at 247.

The Board's interpretation is plainly reasonable. As the court of appeals stated in *Kofa*, the statutory language does not require both a finding that the alien committed a particularly serious crime *and* a distinct finding that the alien is a danger to the community, but instead is more naturally read to say that "the alien constitutes a danger to the community because he has been convicted of a particularly serious crime." 60 F.3d at 1088.

Although the court found the statute's text "plain," it also held that, if it were ambiguous, the Board's view would be entitled to deference because "it is entirely consistent with the statute." *Id.* at 1089. Moreover, as one court of appeals explained, "[w]hen Congress added the asylum exclusion to § 1158 in 1990, the *existing* exclusion in § 1253(h)(2)(B) [for withholding of removal] *already* had been interpreted—by the [Board] and two circuits—as automatically barring withholding of deportation upon conviction of a particularly serious crime," and Congress presumably was aware of, and accepted, that interpretation. *Al-Salehi* v. *INS*, 47 F.3d 390, 394 (10th Cir. 1995).

Petitioner contends (Pet. 28) that the Board's view makes the phrase regarding the "danger to the community" superfluous, but she is mistaken because as the Board explained, that language provides the purpose behind the particularly serious crime inquiry. *Carballe*, 19 I. &. N. Dec. at 360. Petitioner is also wrong to say (Pet. 28-29) that the Board's inquiry does not consider prospective danger to the community. One factor the Board considers in assessing whether a crime is particularly serious is "whether the type and circumstances of the crime indicate the alien *will be* a danger to the community." 19 I. & N. Dec. 360 (emphasis added). As the Board explained, an alien's past crimes provide an indication of her future dangerousness, and "those aliens who have been finally convicted of particularly serious crimes are presumptively dangers to this country's community." *Ibid.* That determination is entirely reasonable.

b. Petitioner concedes (Pet. 26) that every court of appeals to consider the question has agreed with the court of appeals' holding below. See *Choeum* v. *INS*, 129

F.3d 29, 42-43 (1st Cir. 1997); *Ahmetovic* v. *INS*, 62 F.3d 48, 52-53 (2d Cir. 1995); *Kofa*, 60 F.3d at 1088-1089; *Martins* v. *INS*, 972 F.2d 657, 661 (5th Cir. 1992); *Hamama* v. *INS*, 78 F.3d 233, 240 (6th Cir. 1996); *Garcia* v. *INS*, 7 F.3d 1320, 1323 (7th Cir. 1993); *Tian* v. *Holder*, 576 F.3d 890, 897 (8th Cir. 2009); *Kankamalage* v. *INS*, 335 F.3d 858, 861 n.2 (9th Cir. 2003); *Al-Salehi*, 47 F.3d at 396; *Arauz* v. *Rivkind*, 845 F.2d 271, 275 (11th Cir. 1988). That fact counsels powerfully against further review.

Petitioner nonetheless contends (Pet. 26) that the decision below "conflicts with the decisions of other signatories to the [Refugee] Convention." She is mistaken. Those decisions construe other nations' laws, not United States law, and they therefore cannot "conflict" with the court of appeals' analysis of the pertinent provisions in 8 U.S.C. 1158 and 1231. In any event, petitioner is wrong to say that those courts take an approach that is different from that of the Board. Petitioner contends (Pet. 27) that those courts "require both a past conviction and a determination of prospective danger." As explained, the Board's precedent also accounts for future dangerousness in deciding whether a crime is particularly serious, by considering whether the alien's past crime portends future dangerousness. See p. 23, *supra*.

4. This case would be a poor vehicle to consider these issues in any event.

a. First, petitioner was granted deferral of removal under the CAT, see 8 C.F.R. 1208.17, and that decision has not been challenged in this Court. See Pet. 10 n.2 (acknowledging that fact). The grant of deferral of removal gives petitioner much the same relief she would obtain through withholding of removal to China under 8 U.S.C. 1231(b)(3). Petitioner may not be removed to China so long as it remains more likely than not that she

would be tortured if removed there. See 8 C.F.R. 1208.17(b)(1)(iv). The grant of deferral of removal thus also weighs against review in this case.

b. Second, even if this Court agreed with petitioner on the first and second questions presented, that likely would not change the result in this case, because petitioner's tax fraud conviction (as opposed to her export conviction) qualifies as an aggravated felony. The government argued to the IJ that petitioner's conviction for tax fraud was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(M)(i). The IJ rejected that argument, Pet. App. 145a-147a. The government renewed the argument before the Board, A.R. 1267-1270, but the Board declined to address it because it held that an offense need not be an aggravated felony to qualify as a particularly serious crime. Pet. App. 39a-43a. That argument would be open to the Board on remand if this Court decided the first question presented in petitioner's favor.

There is ample reason to believe that the Board would find that petitioner's tax fraud offense is an aggravated felony because it is an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. 1101(a)(43)(M)(i). As this Court recently clarified in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), an offense qualifies as an aggravated felony under that provision if it has fraud or deceit as an element and the circumstances of the alien's particular case involved a loss of more than $10,000. *Id.* at 2302. Petitioner was convicted of a violation of 26 U.S.C. 7206, and fraud or deceit is a necessary element of such an offense. *E.g.*, *Kawashima* v. *Holder*, 615 F.3d 1043, 1054-1055 (9th Cir. 2010). Moreover, petitioner failed to pay more than $88,000 in taxes, so the loss amount easily exceeded the $10,000 statutory threshold. A.R. 6101-6102. The IJ

held that Section 1101(a)(43)(M)(i) excludes violations of the tax laws, Pet. App. 146a, but the text contains no such limitation, and several courts of appeals have recently rejected such a limitation. See *Arguelles-Olivares* v. *Mukasey*, 526 F.3d 171, 172-173 (5th Cir. 2008); *Kawashima*, 615 F.3d at 1052-1054; but see *Lee* v. *Ashcroft*, 368 F.3d 218 (3d Cir. 2004) (relied upon by the IJ below). Because petitioner's tax fraud offense likely qualifies as an aggravated felony, a decision in petitioner's favor on the first or second question presented would not change the ultimate outcome in this case.

c. Third, petitioner failed to fully brief to the Board the second and third questions presented in her petition. An alien must exhaust all challenges to a removal order with the Board before she can obtain federal court review. 8 U.S.C. 1252(d)(1); see, *e.g.*, *Asika* v. *Ashcroft*, 362 F.3d 264, 267 n.3 (4th Cir. 2004) (court of appeals lacks jurisdiction to consider an argument not made to the Board). Regarding the second question presented, in her initial appeal before the Board, and while represented by counsel, petitioner argued only that her crime was not a particularly serious one under the withholding-of-removal provision, 8 U.S.C. 1231(b)(3)(B), and did not mention the parallel asylum provision. A.R. 1348. In her motion for reconsideration, petitioner asserted in general terms that her offense did not qualify as a particularly serious crime under both the asylum and withholding provisions, A.R. 1143, but she only provided argument regarding the withholding provision, A.R. 1144-1146. See Pet. C.A. Br. 40-41; Pet. C.A. Reply Br. 2-4. Petitioner did not argue that an offense must be an aggravated felony or designated as a particularly serious crime by regulation to bar her eligibility for

asylum, or even mention the relevant text of the asylum provision.

Regarding the third question presented, petitioner did not make any argument in her appeal briefs to the Board about whether the asylum or withholding statute require a separate determination about future dangerousness. Instead, she accepted that the *Frentescu* factors controlled whether she was ineligible for withholding of removal because of her crime. A.R. 1347-1348. In her motion for reconsideration, petitioner argued that she was not a danger to the community under the last *Frentescu* factor, A.R. 1153-1154, but she did not argue that even if her crime was a particularly serious one, the Board was required to make a further finding of future dangerousness.

Because petitioner failed to make those arguments to the Board, the Board did not expressly address them in its opinions. See Pet. App. 19a-29a, 30a-46a. The court of appeals did ultimately address the arguments. *Id.* at 12a-15a & n.2. Nonetheless, petitioner's failure to brief the issues in any significant respect before the Board makes this case a poor candidate for further review, because the Court would be deprived of the Board's views, and because there would be a serious question as to whether the federal courts have jurisdiction over the claims at all.

d. Finally, even if the Court accepted petitioner's view on the third question presented, the result would be the same, because the seriousness of petitioner's crime shows that she presents a danger to the United States. Petitioner's crime was "serious, morally reprehensible, and creat[ed] potential future risks" to the United States. Pet. App. 149a. Petitioner "placed her desire for financial gain ahead of the security interests of the

United States" and endangered national security by repeatedly selling "sophisticated microprocessors with well-known military applications" to companies in China that were known to be affiliated with the Chinese military. *Id.* at 16a-17a. She continued that illegal activity even after the United States secured her release from China, and the only reason she ceased her illegal activity is because United States law enforcement authorities discovered it. *Id.* at 23a-24a, 42a, 118a-119a; see also p. 5 & n.1, *supra* (petitioner's post-arrest activities). Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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